

**FILED**

**NOV 12 2019**

Clerk, U.S. District Court  
District Of Montana  
Missoula

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

**BRUCE ALLEN FREY,**

**Petitioner,**

**vs.**

**LIEUTENANT JOHNSON;  
ATTORNEY GENERAL OF THE  
STATE OF MONTANA,**

**Respondents.**

**CV 19-155-M-DLC-KLD**

**ORDER**

Before the Court is the Findings and Recommendations of United States Magistrate Judge Kathleen L. DeSoto. (Doc. 3.) On October 4, 2019, after finding that Petitioner Frey's claims are unexhausted, Judge DeSoto recommended the Court dismiss his petition without prejudice. (*Id.* at 2.) Frey has not timely objected to Judge DeSoto's Findings and Recommendations, and he has therefore waived his right to de novo review of the record. 28 U.S.C. § 636(b)(1)(C).

Absent objection, the Court reviews the Magistrate Judge's findings and recommendations for clear error. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear

error is “significantly deferential” and exists if the Court is left with a “definite and firm conviction that a mistake has been committed.” *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

As Judge DeSoto concludes and his petition acknowledges, Frey has not yet exhausted his state court remedies as required by federal habeas law. (See Doc. 3 at 4; Doc. 1 at 5–6; see also *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).) However, the Court dismisses Frey’s petition without prejudice; therefore, when Frey fully exhausts the claims he advances here, he may return to this Court. Finally, the Court agrees with Judge DeSoto’s recommendation that it deny Frey a certificate of appealability. Reasonable jurists could find no basis to encourage further proceedings on Frey’s unexhausted claims. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Accordingly, reviewing Judge DeSoto’s Findings and Recommendations for clear error and finding none, IT IS ORDERED that:

(1) Judge DeSoto’s Findings and Recommendations (Doc. 3) is ADOPTED IN FULL, and this matter is DISMISSED WITHOUT PREJUDICE for failure to exhaust.

(2) The Clerk of Court is directed to enter a judgment of dismissal.

(3) A certificate of appealability is DENIED.

DATED this 12<sup>th</sup> day of November, 2019.



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Dana L. Christensen, Chief Judge  
United States District Court